

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY GLENN, Personal Representative of
the Estate of ANDREW GLENN, Deceased,

UNPUBLISHED
April 13, 2006

Plaintiff-Appellee,

V

No. 258233
Genesee Circuit Court
LC No. 02-073261-NH

HAL F. MARTENS, D.O. and CONSULTANTS
IN ARTHRITIS & ALLIED CONDITIONS,

Defendants-Appellants,

and

GENESYS REGIONAL MEDICAL CENTER and
HEE DONG PARK, M.D.,

Defendants.

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

This medical malpractice action is before this Court for the second time. In a prior appeal, this Court reversed the trial court's order entering a default against defendants-appellants, Dr. Hal Martens, D.O., and Consultants in Arthritis & Allied Conditions ("defendants"), for failure to timely file an affidavit of meritorious defense. This Court held that the trial court failed to recognize the range of remedies available to it and remanded "for the determination of a proper remedy for defendants' failure to file an affidavit of meritorious defense in a timely manner." *Glenn v Martens*(*Glenn I*), unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 245876). Following a hearing on remand, the trial court issued an order barring defendants from calling any independently retained standard of care expert witnesses at trial. Defendants now appeal this order by leave granted. Because the sanction imposed is married to the purpose of the statutory requirement that defendant provide a timely affidavit of meritorious defense, we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The appropriate sanction for defendants failure to file a timely affidavit of meritorious defense was within the trial court's discretion. *Kowalski v Fiutowski*, 247 Mich App 156, 166; 635 Mich App 502 (2001). An abuse of discretion involves far more than a difference in judicial

opinion, and occurs only when the result is “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Dep’t of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Here, the trial court was aware of its discretion to determine an appropriate remedy for defendants’ failure to timely file their affidavit of meritorious defense. The court was fully apprised of, and considered, the various circumstances involved in the case, including the reason for the delay and prejudice to plaintiff. The court declined to impose a more harsh sanction such as a default or summary disposition, and instead determined that an appropriate sanction was one that was linked to the violation and, accordingly, barred defendants from calling any independently retained expert witnesses at trial. The trial court did not bar standard of care testimony from defendants or other doctors providing treatment and care to plaintiff’s decedent.

In this appeal, defendants asserts that the trial court failed to exercise its discretion when it did not apply the *Kowalski* standards. On appeal, although arguing that the sanction imposed by the trial court was disproportionate, interestingly, defendants do not offer any advice on what sanction is appropriate. Defendants did not argue in *Glenn I*, that no sanction be imposed, but only that the trial court failed to exercise its discretion. This Court remanded for the application of discretion by the trial court. In attempting to fashion a sanction in this case, what alternatives were available to the trial court? The range of sanctions available in this case are: default, summary disposition on liability, restricting of witnesses, and monetary assessments. Our review of the transcript shows that the trial court engaged in a weighing exercise of the available options together with the purposes of the statute in arriving at an appropriate sanction. Clearly the first two alternatives would have been too harsh given plaintiff’s admitted lack of prejudice. The trial court explained anecdotally why the monetary sanction was inappropriate. All that is left is controlling the utilization of witnesses. While the trial court’s editorializing caused defendants distress, the statements are more accurately described as the court’s struggle for fairness. We cannot conclude that the trial court abused its discretion.

Affirmed.

/s/ Michael R. Smolenski

/s/ Donald S. Owens

/s/ Pat M. Donofrio